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NO. 84-468

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

CITY OF CLEBURNE, TEXAS, ET AL.,

Petitioners

V.

CLEBURNE LIVING CENTER, ET AL.,

Respondents

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF ON BEHALF OF PENNSYLVANIA, IOWA, MICHIGAN, MINNESOTA, NEW HAMPSHIRE, NEW JERSEY, OHIO and WISCONSIN, AMICI CURIAE

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INTERESTS OF AMICI

Amici States offer a broad array of services to their mentally retarded citizens, including public education, vocational training, and institutional care and habilitative services.[1] In addition, amici have developed large community placement programs for the mentally retarded through which they encourage, finance and monitor the creation and maintenance of homes in the community much like those at issue in this case. In addition, in at least one amicus state, (Pennsylvania) those programs are subject to and have, on occasion, been thwarted by local zoning ordinances.

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[1]Pennsylvania's institutional services have been the subject of litigation before this Court on several occasions. See Pennhurst State School and Hospital v. Halderman, ___ U.S. ___ (1984); Youngberg v. Romeo, 457 U.S. 307 (1982); Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981).

See Commonwealth v. Ogontz Area Neighbors Association, 483 A.2d 448 (Pa. 1984).

A decision by this Court prescribing the appropriate standard of review for governmental action affecting mentally retarded persons will have a profound impact on Amici's ability to manage their programs properly and efficiently. In this regard, it is important that this Court adopt a constitutional standard for reviewing programs for the retarded which does not unnecessarily restrict the exercise of professional judgment which must guide the day to day decisions of state officials who deal with the needs of the retarded. At the same time, Amici are is also interested in ensuring that the retarded are not discriminated against on the basis of irrational fears grounded in stereotypical views of the retarded.

For the reasons stated below, Amici believe that the rational basis test is the appropriate test to be applied in most cases involving the mentally retarded, including this case. However, we also believe that the zoning ordinance at issue here, which discriminates on the basis of unexplained, and we believe irrational, fears cannot withstand even that deferential level of scrutiny. We, therefore, urge that the judgment of the Court of Appeals be affirmed.

ARGUMENT

I. INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has already addressed, in another context, the real issue presented by this case: the "proper standard for determining whether a State adequately has protected the rights of the . . . mentally retarded." Youngberg v. Romeo, 457 U.S. 307, 321 (1982). Specifically, in Youngberg, this Court held that the proper standard for determining whether a State adequately has protected the rights of the involuntarily-committed mentally retarded was whether "'professional judgment in fact was exercised'" Id. Significantly, in adopting that relatively relaxed standard of review, the Court explicitly rejected, as too demanding, the compelling" and "substantial" necessity tests applied by the Court of Appeals in that case. 457 U.S. at 322.

In Youngberg, the Court rejected the more demanding tests because it believed that they would "place an undue burden on the administration of institutions such as Pennhurst and also would restrict unnecessarily the exercise of professional judgment as to the needs of residents." Id. Thus, at least implicitly, the Court has already decided that the mentally retarded are not a class, "quasi-suspect" or otherwise, whose treatment must always be reviewed under an intermediate standard of review. Similar concerns require rejection of the substantial necessity test adopted by the Court of Appeals in this case. Rather, we believe that the lower level of scrutiny, where the treatment or classification at issue need only bear some fair relation to a legitimate public purpose, is appropriate. See Plyler v. Doe, 457 U.S. 202, 216 (1982).

Nonetheless, the zoning ordinance at issue in this case fails to meet even this deferential test. Thus, we urge this Court to affirm the decision of the Fifth Circuit, albeit on different grounds than those urged by respondents.

II. THE PROPER STANDARD FOR DETERMINING THE CONSTITUTIONAL RIGHTS OF THE MENTALLY RETARDED IS THE RATIONAL RELATIONSHIP TEST

We start our analysis by admitting to substantial doubts concerning the propriety of an intermediate level of scrutiny under any circumstances. In our view, the use of such a test "trespass[es] on the assigned function of the political branches under our structure of limited and separated powers . . . ." Plyler v. Doe, supra, 457 U.S. at 242 (Burger, C.J., dissenting).

Certainly, such a test should be applied, if at all, only with special care. Otherwise it could easily become a "virtual engine of destruction for countless legislative judgments which have heretofore been thought wholly consistent with the Fifth and Fourteenth Amendments to the Constitution." Weinberger v. Salfi, 422 U.S. 749, 772 (1975). This is because, unlike the highest level of scrutiny, which is applicable only in those cases involving either fundamental rights or suspect classifications,[2] the applicability of the intermediate test depends on the "unique confluence" of a number of factors, the significance of which will often be impossible to predict in advance of judicial review. See Plyler

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[2]See San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973).

v. Doe, supra, 457 U.S. at 243 (Burger, C.J., dissenting).

In any event, this Court's decision in Youngberg v. Romeo, 457 U.S. 307 (1982), leaves little doubt concerning the test to be applied in most cases involving the mentally retarded. Specifically, in Youngberg, this Court addressed the question of the "proper standard for determining whether a State adequately has protected the rights of the . . . mentally retarded." Id. at 321.[3] In deciding that issue, the Court explicitly rejected a lower court's use of "compelling" and "substantial" necessity tests to

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[3]Admittedly, Youngberg involved the substantive due process rights of the mentally retarded. However, this Court has generally applied the same standard of review in evaluating substantive due process claims as it has in determining claims under the Equal Protection Clause. See Weinberger v. Salfi, 422 U.S. 749, 771-79 (1975).

determine whether Pennsylvania officials had violated the rights of an involuntarily-committed mentally retarded prison. Id. at 322. Certainly, in so doing, it also rejected, implicitly at least, the notion that the mentally retarded is a group, "quasi-suspect" or otherwise, to which the intermediate standard of review-- that requiring substantial necessity -- must be used in every case.[4]

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[4]Compare Craig v. Boren, 429 U.S. 190, 197 (1976) (classifications based on gender must be "substantially related" to legitimate purpose); Mills v. Habluetzel, 456 U.S. 91, 97 (1982) (same test applied to legislation involving illegitimate children). See also Kirchberg v. Feenstra, 450 U.S. 455 (1981)(gender); Trimble v. Gordon, 430 U.S. 762 (1977) (illegitimacy); Frontiero v. Richardson, 411 U.S. 677 (1973)(gender); Reed v. Reed, 404 U.S. 71 (1971) (gender).

The decision in Youngberg also leaves little room for the argument that a higher standard will often be applicable to the mentally retarded because of the importance of the rights affected. See Plyler v. Doe, supra. Certainly, it is hard to imagine rights much more important or basic than those at issue in Youngberg -- the rights to safe institutional conditions and to freedom from restraints. Certainly, no more important rights are at issue in this case.

Moreover, the subclass of mentally retarded involved in Youngberg -- the involuntarily-committed -- are clearly even more helpless, both politically and in fact, than either the group as a whole or the group of mentally retarded persons presented in

this case.[5] Thus, under the Plyler analysis, there is no basis for applying a higher standard of review in this case that that applied in Youngberg.

Finally, the reasoning of Youngberg is equally applicable to most programs involving the mentally retarded. Specifically, most governmental decisions regarding the mentally retarded involve, or at least should involve, professional judgments. With regard to many of those professional judgments there is no one right answer or even one right approach. To impose a

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[5]The group in this case consists of thirteen retarded persons who are apparently capable of living independently in the community. In contrast, because of the severe character of his retardation, it was conceded that no amount of training would make it possible for Romeo to be released from the State's care. Youngberg v. Romeo, supra, 457 U.S. at 317.

higher level of justification than rationality would "restrict unnecessarily the exercise of professional judgment as to the needs [of the mentally retarded]." See Youngberg v. Romeo, supra, 457 U.S. at 322. Indeed, a higher level of scrutiny might require more than is possible in this quickly evolving field.

It is also relevant, of course, that the mentally retarded are, in fact, different in significant respects. There is no question that they, therefore, have special needs which require differences in treatment.[6]

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[6]Thus for example, Congress has acted to provide increasing levels of protection and resources for the mentally retarded. See, e.g., Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794; Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. § 6000 et. seq.; Education of the Handicapped Act, 20 U.S.C. § 1400 et. seq. Indeed, the CONTINUED ON NEXT PAGE.

Thus, we believe that the rational basis test both "affords the necessary guidance and reflects the proper balance between the legitimate interests of the State and the rights of [the mentally retarded]." See Youngberg v. Romeo, supra. We, therefore, believe the Court of Appeals erred in applying the higher, substantial necessity test in this case.

FOOTNOTE 6 CONTINUED

abundance of legislation directed at assisting the mentally retarded seriously undermines the lower court's findings that the mentally retarded "lacked political power" and that "political organizations for the mentally retarded . . . still possess relatively little power," findings which were critical to its holding that the retarded are a quasi-suspect class. (Appendix to Petition for a Writ of Certiorari, C-14-15).

III. THE ZONING ORDINANCE AT ISSUE IN THIS CASE DOES NOT SATISFY THE RATIONAL BASIS TEST.

This Court has long recognized that government "must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of the State to remedy every ill." Plyler v. Doe, supra, 457 U.S. at 216. The rational basis test reflects this judgment and leaves broad discretion to government in most circumstances.

However, the rational basis test is not a "toothless" one. Logan v. Zimmerman Brush Co., 455 U.S. 422, 438 (1982) (Justice Blackmun's separate opinion). The discretion it grants is not without limits and, in this case, petitioners have exceeded the permiss-

ible scope of that discretion.

Specifically, while government may make rough approximations and need not "choose between attacking every aspect of a problem or not attacking the problem at all," Dandridge v. Williams, 397 U.S. 471, 478 (1970), it must at least attempt rough approximations. In this case, petitioner failed even to make such approximations.

This failure becomes clear from a comparison of those uses permitted under the zoning ordinance and those which are not permitted. For example, public and private schools and colleges, along with their dormitories, fraternity and sorority houses and sports stadiums are permitted. Likewise, homes for delinquent children are permitted in the zone as are hotels, apartment houses and hospitals, all without regard on the number of people living in the

building(s). (Appendix to Petition for a Writ of Certiorari, A-4, District Court Finding of Fact No. 12).

On the other hand, mentally retarded citizens may not establish residence in this zone without a special permit and thirteen mentally retarded citizens were denied such a permit. No credible rational purpose can be established for such unequal treatment of that class. Rather, the true purpose, properly discerned by the Court of Appeals, was to alleviate the irrational fears of other residents of the area. Unsubstantiated and unjustifiable fears do not provide a rational basis for this kind of discrimination. Thus, we believe that the zoning ordinance in this case fails to meet even the deferential rational basis test. We, therefore, urge that this Court affirm the decision of the Court of Appeals.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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